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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. [redacted] 55

RUDDY BROOK CLOTHES, INC.,
Petitioner,

vs.

BRITISH AND FOREIGN MARINE INSURANCE CO., LTD., ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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The Scheffer Press, Inc.—ANdover 3-6850

SUBJECT MATTER INDEX

PAGE

Jurisdiction 2

Summary of the matter involved 2

Questions presented 5

Reasons for allowance of the Writ 5

Argument 8

List of Authorities.

American Medical Association v. United States, 317 U. S. 519 (1943) 10

Anderson v. Ship Owners Association, 272 U. S. 359 (1926) 10

Associated Press v. United States, 326 U. S. 1 (1945) 6, 11, 12

Bedford Co. v. Stone Cutters Association, 274 U. S. 37 (1927) 14

Binderup v. Pathe Exchange, 273 U. S. 291 (1923) ..6, 10, 14

Duplex Co. v. Deering, 254 U. S. 443, 464 (1920) 6, 14

Eastern States Retail Lumber Dealers Association v. United States, 234 U. S. 600, 613 (1914) 5, 9, 11, 12

Fashion Originators Guild, Inc. v. Federal Trade Commission, 312 U. S. 457, 467 (1941) 6, 9, 12

Indiana Farmers Guide Publishing Co. v. Prairie Farmer Publishing Co., 293 U. S. 268 (1934) 13, 16

Kiefer-Stewart Co. v. Seagram & Sons, 340 U. S. 211 (1951) 6, 11

PAGE

Labor Board v. Fainblatt, 306 U. S. 601 13

Loewe v. Lawlor, 208 U. S. 274 (1908) 6, 14

Montague & Co. v. Lowry, 193 U. S. 138 (1904) 5, 9, 10

O'Brien v. United States, 290 Fed. 185 (C.A. 6-1923) 15

Paramount Famous Lasky Corp. v. United States, 282 U. S. 30 (1930) 10

Paramount Pictures, Inc. v. United Motion Picture Theatre Owners, et al., 93 Fed. 714 (C.A. 3-1937) 11

Steers v. United States, 192 Fed. 1 (C.A. 6-1911) 15, 16

Sugar Institute, Inc. v. United States, 297 U. S. 553 (1936) 10

United States v. Columbia Steel, 334 U. S. 495 (1948) ..8, 12

United States v. First National Pictures, 282 U. S. 44 (1930) 8

United States v. Lorraine Journal, 342 U. S. 143 (1951) 16

United States v. Yellow Cab, 332 U. S. 218 (1946) 6, 13

TEXTS, LAW REVIEWS.

Kirkpatrick, W. Wallace—Commercial Boycotts as per se violations of the Sherman Act, 10 George Washington Law Review, 302, 387 (1941) 2

STATUTES.

United States Code Annotated, Title 28, Sec. 1254 and 2101 2

United States Code Annotated, Title 15, Sec. 1 8

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Ruddy Brook Clothes, Inc., an Illinois corporation, respectfully prays for a Writ of Certiorari to review the Order of the United States Court of Appeals for the Seventh Circuit entered March 13, 1952, which Order affirmed the Order dismissing plaintiff's complaint entered by the United States District Court for the Northern District of Illinois, Eastern Division, Honorable William J. Campbell, District Judge, on June 19, 1951.

The Petitioner, being a resident of Chicago, Illinois, and within the Seventh Circuit, invoked the jurisdiction of the United States Court of Appeals for said Circuit by filing therein its Appeal to Review said Order of Dismissal. On March 13, 1952 said Court of Appeals rendered an opinion by Major, Circuit Judge, affirming the Order of Dismissal, a copy of which opinion is set forth in the Record. (Tr. p. 44).

BASIS OF THIS COURT TO REVIEW THE JUDGMENT IN QUESTION.

The jurisdiction of this Court is invoked under Section 1254 of Title 28 U.S.C.A., and the judgment of the Court of Appeals for the Seventh Circuit is subject to review by this Court, as provided in said Section 1254, Title 28, U.S.C.A.

This Petition is filed within the time provided by Section 2101 of Title 28, U.S.C.A.

SUMMARY OF MATTER INVOLVED.

The Petitioner is an Illinois corporation, engaged in the manufacture and jobbing of men's suits and coats, with premises in Chicago, Illinois (Tr. p. 5). All of the respondent insurance companies engage in interstate trade and commerce in insurance, and the respondent, National Board of Fire Underwriters is a service organization for all of the stock fire insurance companies which maintain and support it, and its operations are conducted on an interstate level (Tr. p. 5).

On February 13, 1947 a fire occurred on the premises of the petitioner. After investigation by the adjusters for the respondent insurance companies and the fire authorities of the City of Chicago, the fire loss which was settled for approximately $100,000.00 and the claim of the petitioner with respect to said fire was paid in due course (Tr. p. 7).

Subsequent to the fire, the respondent, National Board of Fire Underwriters, by its agents, made a report dated May 6, 1947 (Tr. pp. 14 to 18), circulated among all of its member companies. This report contained false and misleading statements, and statements derogatory and prejudicial to petitioner. As a result of this report, the respondent insurance companies, with whom petitioner had

been insured, agreed to and did cancel the policies they had respectively issued covering petitioner's premises, as follows:

British & Foreign	Cancelled	6/17/47
Netherlands	"	6/17/47
Law Union & Rock	"	6/17/47
East & West	"	6/17/47
Aetna	"	6/17/47
American Union	"	6/15/47
Pearl	"	6/17/47
Boston	"	6/17/47
Fulton Fire	"	6/15/47
Equitable	"	6/15/47
Hartford	Not Renewed	6/15/47
Phil.—National	Cancelled	10/28/47
Hartford	"	6/17/47
Hartford	"	6/17/47
St. Paul	"	6/17/47
St. Paul	"	6/17/47
Milwaukee	"	6/17/47
Milwaukee	"	6/17/47
Pearl	"	6/17/47

(Tr. p. 8). Since the concerted cancellation of fire insurance by the respondent insurance companies, petitioner has repeatedly attempted to obtain adequate fire insurance to protect its inventory and business, but has not been able so to do, by reason of the concerted refusal to deal with the petitioner by the respondent insurance companies, and by reason of the boycott and black-listing of the petitioner because of the circulation of the report of May 6th (Tr. pp. 8 to 10), which boycott respondents knew would result in no other company selling petitioner insurance (Tr. 8) except as alleged in petitioner's complaint (Tr. pp. 10, 11).

The petitioner has a fluctuating inventory with a valuation in excess of $150,000.00 (Tr. p. 11) but as of the date of the filing of the complaint was able to obtain fire

insurance only in the sum of $95,000.00 (Tr. pp. 10, 11). Every effort of the petitioner to purchase fire insurance, except as aforesaid, has been refused by reason of the respondents' agreement not to deal with petitioner and the circulation of the report of May 6, 1947.

The aforesaid conduct on the part of the respondents and each of them, has the effect of lessening competition in the sale of fire insurance, because although there may well be fire insurance companies who desire the business of the petitioner, they will not seek petitioner's business by reason of the circulation of the aforementioned report and agreement not to deal with the petitioner. As a result of all of the foregoing, the petitioner has been deprived of the opportunity to purchase fire insurance in a free market and consequently has had to assume risks which it would otherwise not have had to assume, and furthermore has had to reduce its business operation from what may be considered normal, in order to minimize any possible loss by reason of a fire (Tr. p. 12).

By reason of the foregoing, petitioner prayed in its complaint that the court find the conduct of the respondents and each of them, in violation of the Sherman Act and asked that the respondents, their successors and their directors, officers and agents, be permanently enjoined from:

1. Continuing the boycott, combination and conspiracy to restrain and to monopolize interstate trade and commerce as alleged in petitioner's complaint.

2. Observing and forcing, attempting to enforce or claiming any rights under the agreements to cancel respondents' fire insurance or any similar agreements.

3. Engaging in or participating in any practices, contracts, relationships or understandings or claiming any rights thereunder having the purpose and

effect of continuing, reviving or renewing any of the violations of the Sherman Act hereinabove described.

Petitioner prayed further that the respondents be directed to reinstate the fire insurance previously cancelled by their unlawful actions hereinabove stated, and that it have such other, general and different relief as the nature of the case may require and to the court may seem proper in the premises (Tr. p. 12).

The District Court sustained the respondents' motion to dismiss the petitioner's complaint. The Court of Appeals for the Seventh Circuit affirmed the Order of Dismissal.

QUESTIONS PRESENTED.

1. Can a boycott be justified? If so, how?

2. Does an illegal boycott under the Sherman Act become legal because the object thereof is a single individual and not a class?

REASONS FOR ALLOWANCE OF WRIT.

1. The decision of the Court of Appeals for the Seventh Circuit, has decided an important federal question in conflict with the applicable decisions of this Court. Said Circuit Court has decided that a boycott is a reasonable restraint of trade where the object thereof is an *individual* and not a *class* and that therefore a complaint alleging such a boycott is subject to a motion to dismiss. The Circuit Court reasons that said boycott is not only not *illegal per se*, but that it is not even *prima facie illegal*, so that no justification need be pleaded by way of answer. Petitioner urges that this decision is counter the rules of law established as such by this Court in all the concerted refusal to deal cases from *Montague & Co.* v. *Lowry*, 193 U. S. 38 (1904) through *Eastern States Lumber Dealers* v.

U. S., 234 U. S. 742 (1914), *Fashion Originators Guild, Inc.* v. *F. T. C.*, 312 U. S. 457, *Associated Press* v. *U. S.*, 326 U. S. 1 (1945) and as recently as *Kiefer Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211 (1951).

The Circuit Court evidently bases its reasoning on the premise that where a sole individual is the object of the restraint, the restraint is *de minimis*. Petitioner urges that said premise is a mistaken one and is contrary to the spirit, if not the letter, of (a) *Binderup* v. *Pathe Exchange*, 263 U. S. 291 (1923) (concerted refusal to deal with a single Nebraska movie owner); (b) *U. S.* v. *Yellow Cab, et al.*, 332 U. S. 218 (which case held that it is the character of a restraint and not the amount of commerce affected that determines a violation under Section 1 of the Sherman Act); (c) the early labor boycott cases, *viz.*, *Loewe* v. *Lawlor*, 208 U. S. 274 (1908) and *Duplex* v. *Deering*, 254 U. S. 443 (1920).

2. The effect of the decision of the Circuit Court substantially limits the rights of private parties to sue under the Sherman Act and makes the rule in the *Yellow Cab* case ephemeral and completely subjective. *De Minimis* has always meant: "The law does not concern itself with trifles". The economic welfare of one individual, we submit, is not a "trifle" and beneath the dignity of a court. As a result of the decision of the Circuit Court, it can be predicted that *de minimis*, as a defense, will be interjected in future private anti-trust litigation.

Wherefore Petitioner prays for the issuance of a Writ of Certiorari to said United States Court of Appeals for the Seventh Circuit.

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Counsel for Petitioners.

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BRIEF IN SUPPORT OF PETITION.

ARGUMENT.

I.

A combined refusal to deal is a prima facie restraint of trade prohibited by the Sherman Act; justification, if any, must be pleaded by way of an Answer.

The plaintiff urges that the concerted refusal by the defendants to deal with the plaintiff, admitted to be true by the defendants for the purpose of the motion to dismiss, is a violation of the Sherman Act,[1] and that such violation does not become innocuous because it is directed only at the plaintiff and not at a class.

A combined refusal to deal has repeatedly been held to be a restraint of trade prohibited by the Sherman Act. Whether or not it is the kind of restraint, like price-fixing, which permits of no justification has not been specifically declared by this Court. But in those cases where the defendants have attempted justification of this type of restraint, the command of the statute has been held to prevail; in no case was there any hint that such a restraint was less than *prima facie illegal.* On the contrary, the *dictum* of this Court in *U. S.* v. *Columbia Steel,* 334 U. S. 495, hinted that the boycott may, like price-fixing, be *illegal per se.*

A case where the essential fact pattern closely parallels the instant case is *United States* v. *First National Pictures,* 282 U. S. 44 (1930) where producers and distributors of films appointed credit committees and sold film only to exhibitors who were *satisfactory credit risks.*

In the case at bar, the complaint alleges that the defendant insurance companies and the National Board of

[1] The applicable portion of Section 1 reads "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations is hereby declared illegal. * * *" 15 U.S.C.A. 1.

Underwriters concertedly refused to sell fire insurance to a corporation who, according to the defendants, was not a good fire risk. In both cases commerce is restrained among the parties to an agreement; *in both cases the individual is deprived of the opportunity to deal in a free market.* It has been indicated by one commentator (Kirkpatrick, W. W., 10 Geo. W. Law Rev. 302, 387, (1941)) that the inference of the *First National* case is that the group refusal to deal is *per se* a violation of the anti-trust laws.

Combinations not to deal have been condemned in a variety of fact situations. In the combination of retailers not to purchase from wholesalers who sold direct to consumers, which was before the Court in *Eastern States Retail Lumber Dealers' Assn.* v. *United States*, 234 U. S. 600 (1914) the retailers determined from whom they would purchase, and concertedly refused to purchase from certain wholesalers. A combination of manufacturers of ladies' garments, embodying designs which they had originated, concertedly refused to sell designs to retailers who engaged in "style piracy", that is, copying more expensive style designs was condemned in *Fashion Originators' Guild Inc.* v. *Federal Trade Commission*, 312 U. S. 457, despite the fact "style piracy" be assumed a *tort* under State law.

In a number of other cases this Court has held that the Sherman Act prohibits concerted refusals to deal which had the purpose and effect of *excluding others from certain trade.* In the early case of *Montague & Co.* v. *Lowry*, 193 U. S. 38, (1904), tile dealers in San Francisco and eastern manufacturers of tiles formed an association, the manufacturers agreeing to sell only to members of the association and the dealers agreeing to buy only from the manufacturer members.

The defendants in the *Montague* v. *Lowry* case decided who were "acceptable" tile dealers by collective action, just as the defendants in the instant case decided by collective action who was an insurable risk.

Another instance of an agreement not to deal, of the kind being considered, is *Binderup* v. *Pathe Exchange*, 263 U. S. 291 (1923). This case involved a concerted refusal to deal by various distributors who were engaged in the production and distribution of motion pictures throughout the United States directed against the *single owner* of several theatres in the State of Nebraska. A judgment for triple damages under the Sherman Act was allowed and the concerted refusal to deal was struck down by the court as an illegal restraint under the Sherman Act.

Three other concerted refusal to deal cases where the practice was denounced were *Sugar Institute, Inc.* v. *United States*, 279 U. S. 553 (1936), where leading sugar refiners had agreed to "refuse to deal with" any person who was carrying on both a brokerage and a warehouse business; *Paramount Famous Lasky Corp.* v. *United States*, 282 U. S. 30 (1930), where the principal distributors of motion pictures agreed that they would enter into exhibition contracts only with exhibitors who would sign a contract containing specified provisions for arbitration of all disputes arising thereunder; and *Anderson* v. *Shipowners Association*, 272 U. S. 359 (1926), where the shipowners surrendered their right to hire seamen to the Shipowners Association, and refused to hire those seamen not approved.

Agreements not to deal have involved a variety of other situations. In *American Medical Assn.* v. *United States*, 317 U. S. 519 (1943), the purpose was to protect

the economic interests of the individual members of a non-profit membership corporation. A rule adopted by that corporation prohibited its doctor members from having professional relations with any individual or organization not on an "approved" list. Here the evil was a collective determination of what organizations or individuals are approved, and a concerted refusal to deal when the determination was made.

In *Associated Press* v. *United States,* 326 U. S. 1, (1945) where members of the Associated Press had concertedly refused to sell news to non-members, the Court held that such group refusal to sell was a restraint of trade under the Sherman Act.

In *Kiefer-Stewart Co.* v. *Seagram & Sons,* 340 U. S. 211 (1951), where the complaint charged defendants had refused to sell liquor to those Indiana wholesalers who would not resell at prices fixed by Seagram and Calvert, the Court held such concerted refusal to deal was a violation of Section 1 of the Sherman Act.

In some refusal to deal cases, as in this cause, a "Black List" has been employed. Thus in the case of *Eastern State Lumber Dealers* v. *U. S.,* 234 U.S. 742, 746, (1914) the Black List was circulated listing the offending dealers. This the court condemned as an illegal restraint under the Sherman Act. And in the case of *Paramount Pictures, Inc.* v. *United Motion Picture Theatre Owners, et al.,* (CA 3, 1937) 93 Fed. 714, the Court did likewise.

We believe that the rule to be drawn from the cases, taking them as a whole, is that a concerted refusal to deal is a restraint prohibited by the Sherman Act. If an agreement is found to be of the kind described, we submit, in the alternative, that (a) as in the case of price-fixing agreements, the law prohibits justification upon

the basis of judicial appraisal of the good and evil consequences of the combination; see *Fashion Originators Guild, Inc.* v. *F.T.C., supra,* pp. 467-468 and *U. S.* v. *Columbia Steel,* 334 U.S. 495, 522; or (b) if justification is permitted, it must be pleaded by way of an answer.

Defendants' boycott has resulted in the following:

(a) Deprived the plaintiff of the opportunity to deal in a free market (*First National* case);

(b) The surrender of each defendant of their freedom of action (*Eastern States Lumber, Anderson* v. *Shipowners, Associated Press* v. *U. S.* and *Fashion Originators* cases); and

(c) Trial of plaintiff by an extra judicial tribunal, *Eastern States Lumber, Associated Press,* and *Fashion Originators* cases).

If defendants may boycott an individual plaintiff without accountability, the scope of the Sherman Act has been substantially limited. The argument of the Court of Appeals for the Seventh Circuit that the defendants owed an obligation to their policy holders not to deal with a bad fire risk, is no better an argument than that price-fixers owe an obligation to their stockholders to earn maximum profits. Justification of an illegal restraint has traditionally been held by this Court to be no defense (*Fashion Originators* case). Plaintiff is entitled under the Sherman Act to bid for insurance in a free market of competitors, not conspirators.

II.

A boycott directed at one individual is a restraint under Section 1 of the Sherman Act, and the amount of commerce affected is immaterial.

A. The Minimal Commerce Doctrine:

When is a boycott not a boycott? The Court of Appeals for the Seventh Circuit reasons that a boycott is not a boycott when directed at *one*, as distinct from a *group*. This is a novel doctrine. Thus, the geographical area of the restraint and the part of the total commerce involved are necessarily limited in each Sherman Act case. This Court made this clear in *Indiana Farmer's Guide Publishing Co.* v. *Prairie Farmer Publishing Co.*, 293 U.S. 268 (1934), and explicitly so held in *United States* v. *Yellow Cab Co., et al.*, 332 U.S. 218 (1946) page 225:

> "But the amount of interstate trade thus affected by the conspiracy is immaterial in determining whether a violation of the Sherman Act has been charged in the complaint. Section 1 of the Act outlaws unreasonable restraints on interstate commerce, *regardless of the amount of the commerce affected.* (Italics ours) *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, note 59, p. 225; *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 485. And Section 2 of the Act makes it unlawful to conspire to monopolize 'any part' of interstate commerce without specifying how large a part must be affected. Hence it is enough if some appreciable part of interstate commerce is the subject of a monopoly, a restraint or conspiracy. • • •"

In *Labor Board* v. *Fainblatt*, 306 U.S. 601, 605, 606, the Court perhaps gave a clue to the meaning of "appreciable", as used in the *Yellow Cab* case. In the *Fainblatt* case this Court indicated that the scope of the Sherman Act was limited only by the doctrine of *De Minimis*.

That a boycott directed solely at one individual is as much a violation of the Sherman Act, and is not *De Minimis* as a boycott directed at an individual as a member of a class is shown by the decisions of the Supreme Court in the early labor boycott cases. Thus, in *Loewe* v. *Lawlor,* 208 U.S. 274 (1908) the object of the refusal to deal was *one* hat manufacturer, and the impact upon the market for hats because of such refusal was infinitesimal. *"De Minimis"* if not applicable in the *Loewe* case is not properly applicable in the instant case.

In *Duplex Co.* v. *Deering,* 254 U.S. 443 (1920), the object of the boycott was *one* Michigan printing press manufacturer, and regardless of the court's decision, the relevant market could not have been affected.

These cases were affirmed in *Bedford Cut Stone Co.* v. *Journeyman Assn.,* 274 U.S. 37 (1927) where the Court avoided resting the decision on *price* change in the market and relied on the fact that the boycott had stopped sales of the stone in question just as the boycott herein has stopped sales of its subject matter, *viz.,* insurance. The court was concerned in the *Bedford* case with the boycotted stone as such, and not its relationship to the stone market in general. The labor boycott cases may be compared with the case of *Binderup* v. *Pathe Exchange,* 263 U.S. 291 (1923), holding illegal a concerted refusal to deal case brought under the Sherman Act by the owner of several theatres in the State of Nebraska against distributors who were engaged in the production and distribution of motion pictures throughout the United States. The plaintiff in that case, like the plaintiff here, exhibited an infinitesimal portion of the films (clothes) exhibited in the United States, or even in the State of Nebraska (Illinois).

The reasoning of the Seventh Circuit that activity otherwise illegal becomes legal because small in scope, runs counter to the rationale of the cases cited by Petitioner herein and severely limits the scope of the Sherman Act. The illegal combination of the defendants to harm the plaintiff is obviously not *de minimis* to the plaintiff; *the test is the character of the restraint,* not the effect on the entire market. The Sherman Act supplies a remedy for individual harm.

Early decisions of the Court of Appeals for the Sixth Circuit recognized this proposition. Thus in *Steers* v. *U. S.,* 192 F. (1) (C.A. 6, 1911) involving the refusal by a group of tobacco dealers to permit shipment *of a single load of tobacco of three farmers,* the defendant raised the argument that the public was not concerned as the amount of commerce was infinitesimal. The Court rejected this argument, however, and held a single private injury may well tend to this public result (p. 5). The *Steers* case was affirmed by a later Sixth Circuit case, *O'Brien* v. *U. S.,* 290 Fed. 185 (1923) involving shipment of a single steel billet.

B. The Public Interest Doctrine.

The District Court dismissed the complaint because it felt that there was no public injury and respondents relied heavily on this argument in the Court of Appeals, although said court did not rest its decisions on this doctrine. The complaint does allege public injury because *where there is a violation of the Sherman Act, there is public injury.*

The method therefore of determining whether there is a violation of Section 1 of the Sherman Act is to determine what the courts have found to be unreasonable restraints

of trade. ***When this is determined, it follows inexorably that the public has been injured.*** Public injury and restraint of trade are indivisible.

The relationship of the "public interest" argument, as conceived by the District Court, and the "quantity of commerce" conceived by the Circuit Court argument, is a congruent one. In fact they appear to be almost the same argument couched in different words. *Steers* v. *U. S., supra,* page 14. ***Both arguments rest on the proposition that where the object of the boycott is one individual and not a class, that the public is not*** interested because the commerce involved in *minimal.* We submit that the assumption of both the Trial Court and the Court of Appeals is not legally correct, as shown by the Labor Boycott cases, the first *Yellow Cab* case, the *Binderup* case and the *Indiana Farm Guide* case. Furthermore, the cases relied on by the Trial Court and the respondents in their brief in the Court of Appeals were *individual* refusal to deal cases, and therefore not persuasive.

We submit that a boycott directed at one individual is a restraint of trade under Section 1 of the Sherman Act and that the minimal commerce and public interest doctrines as urged by the Circuit and District Courts should be rejected. As this court has said in the *Indiana Farm Guide* case (P. 279), the first *Yellow Cab* case (P. 225) and the case of *U. S.* v. *Lorraine Journal.*

> "The provisions of Section 1 and 2 have both a *geographical* and *distributive* significance and apply to any part of the United States as distinguished from the whole and to *any part* of the classes of things forming a part of interstate commerce."

CONCLUSION.

It is submitted by the petitioner that a concerted refusal to deal is a violation of Section 1 of the Sherman Act. Petitioner's complaint states a cause of action. The decision of the Court of Appeals for the Seventh Circuit affirming the dismissal of the complaint is in conflict with the decisions of this Court on a question important to the effective enforcement of the Anti-Trust Laws. Petitioner respectfully urges, therefore, that this Court grant the petitioner a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

SUBJECT MATTER INDEX.

PAGE

Opinions of the Court Below 1

Jurisdiction 1

Matter Involved 1

Question Presented 3

Argument 3

I. There is no conflict between the decision below and the decisions of this Court upon which petitioner relies 4

II. The decision below did not add new limits to the Sherman Act 9

Conclusion 11

List of Authorities.

American Medical Association v. United States, 317 U. S. 519 (1943) 5, 6

Anderson v. Shipowners Association, 272 U. S. 359 (1926) 8

Apex Hosiery Co. v. Leader, 310 U. S. 469 (1940) ...5, 10

Associated Press v. United States, 326 U. S. 1 (1945) . 5, 6

Bedford Cut Stone Company v. Journeymen Stone Cutters Association, 274 U. S. 37 (1927) 10

Binderup v. Pathe Exchange, Incorporated, 263 U. S. 291 (1923) 5, 6

Duplex Printing Press Company v. Deering, 254 U. S. 443 (1921) 10

Eastern States Retail Lumber Dealers' Association v. United States, 234 U. S. 600 (1914)..... 5-6

Fashion Originators' Guild of America, Inc. v. Federal Trade Commission, 312 U. S. 457 (1941) 5, 6

Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U. S. 211 (1951) 8

Loewe v. Lawlor, 208 U. S. 274 (1908) 10

Montague & Company v. Lowry, 193 U. S. 38 (1904) .. 5, 6

Paramount Famous Lasky Corporation v. United States, 282 U. S. 30 (1930) 7

Sugar Institute, Inc. v. United States, 297 U. S. 553 (1936) 8

United States v. First National Pictures, Incorporated, 282 U. S. 44 (1930) 7

United States v. Yellow Cab Co., 332 U. S. 218 (1947) 10

STATUTES.

United States Code, Title 15, Sec. 1 3

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS OF THE COURTS BELOW.

The opinion of the Trial Court appears at R. 25-28 and is reported at 103 F. Supp. 290. The opinion of the Court of Appeals for the Seventh Circuit appears at R. 44-49, and is reported at 195 F. 2d 86.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition (p. 2).

MATTER INVOLVED.

The Summary of Matter Involved found in the Petition (pp. 2-5), is subject to the following additions and corrections:

1. The matter involved is the alleged refusal, by

seventeen insurance companies, to underwrite the fire risks at 622-24 West Roosevelt Road, Chicago, Illinois, and at no other place. This refusal was operative after petitioner's 1947 fire, and at no other time. The refusal had the effect that petitioner reduced its inventory and its operation to the extent (R. 12) that petitioner from time to time desired not to assume its own fire risks on the portion of its inventory valued in excess of $95,000, its insurance protection (R. 10) and up to $150,000, the value of its inventory from time to time (R. 11). There is no allegation that it had any other effect.

2. The alleged refusal by defendant to sell fire insurance to plaintiff *resulted* (Complaint, par. 8, R. 6 and par. 12, R. 11) from the confidential report (R. 14-18), which stated that the origin of each of petitioner's two fires remained undetermined, after thorough investigation. It had no other motivation or impetus.

3. The Petition exaggerates the scope of the alleged restraint in two respects. First, the report dated May 6, 1947, was not circulated by respondent National Board of Fire Underwriters or its agents, "among *all* of its member companies," as the Petition asserts. (P. 2, Italics supplied.) The complaint alleged (par. 8, R. 7) that said report "was distributed to 'Companies Interested'," which were "the insurance companies with whom the plaintiff had been insured * * *." In fact, five members of respondent National Board of Fire Underwriters were underwriting petitioner's fire risks when the complaint was filed (R. 11), which refutes petitioner's implication that all members refused to deal with petitioner. Second, petitioner errs in reciting (p. 3) that its inability to obtain "adequate" fire insurance resulted from "the boycott *and black-listing* of the petitioner." (Italics supplied.) Petitioner's reference to "blacklisting" implies that petitioner was added to an existing list, but the complaint alleged (par. 8, R. 6) that the "combination and conspiracy" complained of "had its inception as a result of" petitioner's 1947 fire. It

did not charge a conspiracy to black-list poor arson risks, or any other group or class of persons, or to refuse insurance to any applicant, other than petitioner.

4. Petitioner's conclusions that "the respondent insurance companies, with whom petitioner had been insured, *agreed to* and did cancel" (pp. 2-3, italics supplied) petitioner's policies, that respondents' conduct "has had the effect of lessening competition in the sale of fire insurance," and that "petitioner has been deprived of the opportunity to deal in a free market" (p. 4) are not supported by the factual allegations of the complaint. The facts alleged are that a report was circulated to the respondent companies and that each of them thereafter refused to deal with plaintiff.

QUESTION PRESENTED.

Petitioner's formulation of the questions presented assumes that every boycott restrains trade unreasonably, and violates the Sherman Act unless it is justified. The court below held (R. 49) that defendants' conduct was too "impotent in relation to either commerce or competition," to violate the Sherman Act. Respondents submit that the question presented by the decision below is:

> Whether the court below erred in determining that defendants' alleged conduct did not restrain trade unreasonably?

ARGUMENT.

The complaint attempted to state a claim for threatened injury to petitioner by reason of an unreasonable restraint by respondents, of "trade or commerce among the several States" (Title 15 U. S. C., § 1).

It succeeded only in stating a plea to the Court to allay, by the extraordinary remedy of injunction, petitioner's doubts and fears that somewhat more than $95,000 worth

of its $150,000 inventory might some day be destroyed by fire. Petitioner's doubts and fears resulted from the refusal of seventeen fire insurance companies to assume the risk that petitioner itself did not wish to bear.

Petitioner failed to allege any facts to support the essential elements of a Sherman Act claim, that defendants have contracted, combined or conspired unreasonably to restrain competition in their own line of commerce or in some other appreciable segment of commerce. Claims under the Sherman Act, like claims under other statutes, must state the essential elements of a cause of action under the statute relied upon.

Petitioner contends, however, that by use of the incantation, "boycott," it has escaped the requirement that a plaintiff allege some unreasonable purposes or effects of respondents' conduct, upon commerce and upon competition in the market.

Petitioner relies upon two "reasons for allowance" of the writ sought. First, petitioner asserts that the decision of the Court of Appeals is "in conflict with the applicable decisions of this Court." Second, petitioner argues that the decision below adds new limits upon the right of private parties to sue under the Sherman Act.

I. There Is No Conflict Between the Decision Below and the Decisions of This Court Upon Which Petitioner Relies.

The Court of Appeals did not, as petitioner asserts, differentiate between individuals and classes as subjects of boycotts. It differentiated between, (a) boycotts which impose an unreasonable restraint upon competition in an appreciable segment of commerce, and, (b) respondents' conduct, which was "as impotent in its relation to either commerce or competition as a lighted match to the tem-

perature of all outdoors." In each case cited by petitioner, this Court found an unreasonable and substantial restraint of competition in a general market.

The rule to be drawn from them is not as petitioner suggests, "that a concerted refusal to deal is a restraint prohibited by the Sherman Act" (p. 11), but that "a suppression of competition in the market," *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 506 (1940)[1] by boycott methods is illegal. Every case cited by petitioner involved an unreasonable and potent effort to control the market for goods or services. The cases have in common the fact that in each case, the boycott was a means of forcing non-members of the combination to accede to the demands of the combination. The objectives of the combination were illegal, and the means used to achieve those objectives were merely incidental.

Six of the ten cases upon which petitioner relies were combinations among competitors to exclude rivals from competition in their line of commerce. Petitioner here did not allege that respondents combined to exclude him, or others, from the fire insurance business. Hence there is no conflict between the decision below and the decisions of this Court in *Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U. S. 600 (1914); *Fashion Originators' Guild of America, Inc.* v. *Federal Trade Commission*, 312 U. S. 457 (1941); *Montague & Company* v. *Lowry*, 193 U. S. 38 (1904); *American Medical Association* v. *United States*, 317 U. S. 519 (1943); *Associated Press* v. *United States*, 326 U. S. 1 (1945) and *Binderup* v. *Pathe Exchange, Incorporated*, 263 U. S. 291 (1923).

The *Eastern States* case involved a conspiracy among

[1] This Court described four of the cases relied upon by petitioner as involving "a suppression of competition in the market" by boycott methods, in the *Apex Hosiery* case, at p. 506. See quotation at p. 10, *infra*.

retail lumber dealers "to keep the retail trade to themselves * * *." (234 U. S. at p. 608.) The *Fashion Originators'* case involved a combination to exclude "style pirates" from competition with style originators. The *Montague* case involved exclusion of competitors in the retail sale of tile, and price-fixing as well. Of the *Medical Association* case, this Court stated (317 U. S. at p. 529), "the conspiracy was aimed at restraining or destroying competition, or * * * restraint of the free availability of medical or hospital services in the market * * *." In the *Associated Press* case, this Court rejected a request to hold the by-laws requiring A.P. members not to deal with nonmembers illegal, "standing alone," and approved the District Court's decree which outlawed that requirement only pending A.P.'s obedience to the injunction against its restrictive membership requirements. (326 U. S. at p. 22.)

In the *Binderup* case, the plaintiff "was in the business of selecting and distributing [films] to a circuit" of at least twenty theatres. (263 U. S. at p. 302.) The conspiracy in *Binderup* "was organized for the purpose of enabling these distributors [the defendants] to control prices and dictate terms to their patrons in Nebraska and other States." (p. 303.) Binderup was an exhibitor in several theatres which he owned or leased, as well as a distributor. Some of the defendant distributors, from whom Binderup had refused to buy film, "made threats to put him out of business *by underbidding* and supplying the various theatres constituting his circuit * * *." (p. 303, italics supplied.) The Omaha Film Board of Trade prevented the threatened underbidding by placing Binderup upon a blacklist and conducting a boycott against him. (p. 303.) No comparable control of the general market, or use of a boycott to protect that control, is alleged in the instant complaint.

United States v. *First National Pictures, Incorporated,* 282 U. S. 44 (1930), and *Paramount Famous Lasky Corporation* v. *United States,* 282 U. S. 30 (1930), were companion cases, involving two different aspects of the same system of trade restraint by motion picture distributors.

In the *First National* case, the "definite point of attack" was the conspiracy "to restrict freedom of sales by [motion picture] Distributors and of purchases by Exhibitors." (282 U. S. at p. 53.) This conspiracy forced all new owners of theatres in the area, under threat of an organized boycott by distributors, "to assume and complete all existing contracts entered into by the prior owners" (282 U. S. at p. 50) (and thus for a time, at least, to follow the prior owner's policy as to run and clearance). The scheme was camouflaged to appear as a credit-rating plan, by requiring security deposits from new owners who failed to assume prior owners' contracts, and by using the name, "credit committee". The court found the spurious "credit committee" in the *First National* case to be unlawful because of its purpose and effect of controlling the market for films. (282 U. S. at p. 54.)[2]

Paramount Famous Lasky Corporation v. *United States,* 282 U. S. 30 (1930), dealt with the legality of the distributors' use of standard contracts binding all exhibitors to compulsory arbitration agreements. The opinion emphasized the defendants' over all control and regulation of the industry as the essential element involved in the violation. (pp. 42-44.)

[2] By contrast, the alleged boycott in the instant case was based upon a *bona fide* investigation of petitioner's two unexplained fires. It was allegedly pointed at petitioner only. It was not directed to the market for insurance, nor did it involve expulsion or other penalties against non-cooperating fire insurance companies. Five members of respondent National Board of Fire Underwriters actually provided $21,500 in insurance to petitioner at the time this suit was filed. (R. 10, 11.)

In *Sugar Institute, Inc.* v. *United States*, 297 U. S. 553 (1936), the Court was chiefly concerned with the arrangements in the industry which tended to fix prices and otherwise restrain trade in the market, and classed the refusal to deal with persons carrying on both a brokerage and a warehouse business as a "supplementary" restriction (p. 586), one of several "offspring of the basic agreement." (p. 601.)

Anderson v. *Shipowners Association*, 272 U. S. 359 (1926), was a combination to regulate the employment of merchant seamen on the Pacific Coast. The defendants, shipowners and operators, had restrained "their freedom to carry on interstate and foreign commerce according to their own choice and discretion * * *." (272 U. S. at p. 365.)

Petitioner's reliance upon *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211 (1951), illustrates the fallacy of petitioner's reasoning. Indisputably, the *Kiefer-Stewart* case is a price-fixing case, and the refusal to deal was a method and not an object of the combination, but petitioner reads it as if the tactic of refusal to deal was the heart of the violation.

Thus, petitioner would have the Court read all of its previous Sherman Act decisions to ascertain what means were used by the combinations condemned, and declare that any means so used is illegal, regardless of whether the object or effect of the combination was to restrain trade unreasonably.

This Court has consistently looked, not to the methods of reaching agreement or the methods of enforcing compliance with agreements reached, but to their content; their purposes and effects. Where the objective is to substitute private regulation and domination of commerce for Congressional authority, any means, whether innocuous or vicious, are condemned as parts of a broader plan.

In the instant case, *there is no broader plan*, and the Sherman Act therefore has no application. The decision of the Court below is in harmony with the previous decisions of this Court.

II. The Decision Below Did Not Add New Limits to the Sherman Act.

Petitioner's second reason for granting certiorari is that the decision below limits the rights of private parties to sue under the Sherman Act by permitting *de minimis* to be interjected as a defense. Petitioner states, "The economic welfare of one individual, we submit, is not a 'trifle' and beneath the dignity of a court." The court below did not say that it was. It stated that "The effect upon competition, like that upon the flow of commerce, was *'de minimis'*, it could have had no 'appreciable' effect upon either. * * * any restraint which * * * [respondents] imposed upon either the flow of commerce or competition is so trifling that it cannot be categorized as unreasonable." The court was thus stating in other words the proposition that the Sherman Act does not provide a remedy for every tort or every injury which several parties inflict upon another; its office is to protect the free market against unreasonable restraint.

The commerce involved herein is only the business of selling fire insurance to protect the premises at 622-624 West Roosevelt Road, Chicago, Illinois, against risk of loss by fire. Nothing whatsoever was alleged in the complaint which might indicate that the clothing business, in which petitioner is engaged, the fire insurance business, or any other business or profession would be substantially affected by an incompletely underwritten fire loss in petitioner's building. No facts were stated which indicated that any appreciable segment of commerce in the United States had been or might in the future be

affected by the concerted refusal of defendants to assume the risks which petitioner is desirous of transferring to them.

Petitioner seeks to distort beyond recognition the holding of *United States* v. *Yellow Cab Co.*, 332 U. S. 218 (1947), that unreasonable restraint of an appreciable market for interstate goods violates Section 1. The Court below accepted the *Yellow Cab* case as its guide, and held that such a slight disadvantage to an entity so small as petitioner's business was not an unreasonable restraint of an appreciable part of interstate commerce. Petitioner would have this Court reverse this finding by the Court of Appeals, on the precedent of *Loewe* v. *Lawlor*, 208 U. S. 274 (1908); *Duplex Printing Press Company* v. *Deering*, 254 U. S. 443 (1921); and *Bedford Cut Stone Company* v. *Journeymen Stone Cutters Association*, 274 U. S. 37 (1927). *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469 (1940), at pages 505-506, pointed out that the *Loewe*, *Duplex* and *Bedford* cases all involved activities:

> "carried on on a country-wide scale by a national labor organization, in order to induce the purchasers of a manufactured product shipped in interstate commerce to withdraw their patronage from the producer.
>
> "* * * the activities affecting interstate commerce were directed at control of the market and were so widespread as substantially to affect it. There was thus a suppression of competition in the market by methods which were deemed analogous to those found to be violations in the non-labor cases. See *Montague & Co.* v. *Lowry*, 193 U. S. 38, 45, 46; *Retail Lumber Dealers Co.* v. *United States, supra; Paramount Famous Lasky Co.* v. *United States*, 282 U. S. 30; *United States* v. *First National Pictures*, 282 U. S. 44."

It is thus plain that the *Loewe*, *Duplex* and *Bedford* cases, contrary to petitioner's understanding of them, were concerned with significant nationwide conspiracies which unreasonably restrained interstate trade and commerce.

III. Conclusion.

Respondents submit that the petition herein is without merit and should be denied.

Respectfully submitted,

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